**PP**

**v.**

**TAN CHOON EIN**

HIGH COURT MALAYA, PULAU PINANG
ZAMANI A RAHIM J
[CRIMINAL REVISION NO: 43-7-09-2012]
14 JANUARY 2013

***CRIMINAL PROCEDURE:*** *Bail - Granting of - Conditions for bail - Theft - Penal Code, s. 457 - Accused sentenced to four years imprisonment and one stroke whipping - Absence of instructions to appeal by accused or family - Stay pending appeal allowed on bail - Whether bail justified*

***CRIMINAL PROCEDURE:*** *Stay of execution pending appeal - Application for - Absence of instructions to appeal by accused or family - Application for stay allowed on enhanced bail - Whether grounds of application constituted special circumstances to justify stay*

At the Magistrate's Court, the respondent ('the accused') was found guilty and convicted for the charge of committing theft, an offence under s. 457 of the Penal Code ('Code') and was sentenced to four years imprisonment and one stroke of whipping. Having sentenced the accused, learned counsel for the accused applied for stay of execution as it was submitted that instructions on whether to proceed with the appeal or not were yet to be given by the accused or his family. Enhancing the bail of RM10,000 to RM14,000, the Magistrate allowed the stay application pending appeal on the sole ground that the accused's father was ill and in a critical condition. Aggrieved by the Magistrate's decision, the prosecution applied to the High Court for revision under s. 31 of the Courts of Judicature Act 1964 ('the Act') and s. 323 of the Criminal Procedure Code ('CPC').

**Held (setting aside stay granted by court below):**

**(1)** The Magistrate had erred in granting bail as the offender's personal problems did not constitute special circumstances to justify the stay and was inconsistent with the established legal principles. Furthermore, the health problem of the accused's father advanced by learned counsel for the accused was not backed by any medical report. (paras 11 & 13)

**(2)** It was obvious that the accused was a repeated offender as, in addition to the conviction of the serious offence committed in this case, the accused also had three previous convictions under ss. 411 and 457 of the Code coupled by several other ongoing cases, also under s. 457. The Magistrate had erred in not considering the seriousness of the offence of housebreaking with the intention to commit theft and that the accused was a habitual criminal. Public interest demands that the accused who possessed several records of housebreaking to be in prison without giving him bail pending appeal as he is a menace and a continuous threat to the society. (paras 14, 15 & 16)

**(3)** The application for stay pending execution by learned counsel for the accused bore no issues or the prospect of success of the accused. The conviction of the accused was based on overwhelming evidence and it was highly unlikely that the accused would be able to put up a formidable and successful appeal. Allowing the application for stay of execution without considering the merits of appeal would only open a floodgate of unmeritorious appeals upon the offender's conviction. (paras 19, 20 & 21)

**Case(s) referred to:**
*Dato' Seri Anwar Ibrahim v. PP And Another Application [2004] 1 CLJ 592 CA* ***(refd)***
*KWK (A Child) v. PP [2003] 4 CLJ 51 CA* ***(refd)***
*PP v. Mohd Azam Raja Abdullah [2012] 8 CLJ 506 HC* ***(refd)***
*Rohadi Sabtu v. PP [2007] 10 CLJ 733 HC* ***(refd)***
*Sharma Kumari Oam Parkash v. PP [2000] 1 LNS 123 HC* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, ss. 31, 57(1)
Criminal Procedure Code, ss. 311, 323
Penal Code, ss. 411, 457

*For the applicant - Tan Guat Cheng; DPP*
*For the accused - In person*

*Reported by Najib Tamby*

## JUDGMENT

**Zamani A Rahim J:**

**[1]** The respondent (hereinafter referred to as "the accused") was charged at the Magistrate Court (3) at Georgetown with housebreaking with the intention to commit theft and in fact theft of nine flat screen computers, and two control processing unit (CPU) both of Dell brand, a CPU memory CCTV and a projector valued a total of RM30,000 was committed, an offence under s. 457 of the Penal Code.

**[2]** After a full trial, the accused was found guilty, convicted as charged and he was sentenced to four years imprisonment from the date of conviction ie, 28 August 2012 and one stroke of whipping.

**[3]** Having sentenced the accused, learned counsel had informed the trial court that he had to get instructions from the accused or his family, whether to lodge an appeal or not. According to Record of Revision at p. 141, learned counsel informed the court as follows:

> Jika arahan untuk rayuan, pohon untuk 'stay' diberi dahulu, jika rayuan difailkan.

**[4]** Despite learned deputy's vigorous objection to the application for stay pending appeal by the accused, the trial Magistrate had allowed the application on condition that the notice of appeal was lodged the same day (ie, 28 August 2012). The trial Magistrate had enhanced the bail of RM10,000 to RM14,000 and allowed the stay application on the sole or single ground of:

> dasar kemanusiaan yang mana bapa OKT sedang sakit dan kritikal.
>
> [p. 143 Record of Revision]

**[5]** Aggrieved by the decision of the trial Magistrate to allow the stay application pending appeal, learned deputy had prepared a record of proceedings before the Magistrate and transmitted the same to this court with the request for revision under s. 31 Courts of Judicature Act 1964 and s. 323 of the Criminal Procedure Code.

**[6]** Having gone through the notes of proceedings and the case laws pertaining to application for stay pending appeal, I have set aside the stay granted by the trial Magistrate. The accused was to serve his imprisonment term forthwith. My reasons are stated below.

**[7]** The law on a stay of execution pending appeal is governed by s. 311 of the Criminal Procedure Code which stated as follows:

> Except in the case of sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a Judge may stay execution on any judgment, order, conviction or sentence pending appeal, on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the judgment, order, conviction or sentence as to the Court below or to the Judge may seem reasonable.

**[8]** Similar provision can be found in the Courts of Judicature Act 1964. Section 57(1) provides as follows:

> 57. (1) Except in the cases mentioned in subsection (3) and section 56A, no appeal shall operate as a stay of execution, but the High Court or the Court of Appeal may stay execution on any judgment, order, conviction or sentence pending appeal on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the judgment, order, conviction or sentence as to the Court may seem reasonable.

**[9]** It is clear that the granting of the stay of execution pending appeal is not automatic. It is a judicial exercise of discretion by the court based on well established principles. In *Sharma Kumari Oam Parkash v. PP* [2000] 1 LNS 123, Abdul Wahab Patail J said:

> The discretion vested in the Court to grant bail should be judiciously exercised in accordance with the principles laid down by the Statutes on the facts of each particular case.

His Lordship went on to say:

> ... a stay of execution should not be granted and will not be granted by me unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is not

sufficient reason. The only reason given in this case is that the applicant who has been advised verily believes he has good reasons for appeal. That, also in my view does not constitute grounds for releasing an appellant pending appeal.

**[10]** In the Court of Appeal case of *Dato' Seri Anwar Ibrahim v. PP And Another Application* [2004] 1 CLJ 592, Pajan Singh Gill, FCJ had summarised the principles of law as guidelines in the exercise of discretion when considering an application for bail pending appeal are as follows:

(a) that the presumption of innocence is no longer a factor to consider;

(b) that the factors to consider differ from that of pre-conviction application for bail;

(c) that attendance in court is only a minor consideration;

(d) that the time lapse before the appeal can be determined in relation to the length of sentence imposed is a relevant factor. But there is no general rule to say that an applicant with short custodial sentence should be automatically given bail. In appropriate cases bail may be refused even if it means that the sentence will be served before the appeal is heard;

(e) that it is crucial for an applicant to show the presence of exceptional circumstances which would drive the court to conclude that justice can only be done if bail is granted;

(f) that where reliance is placed on proposed grounds of appeal, they must be *prima facie* very strong or extraordinary high prospect of success;

(g) that public confidence in the administration of justice requires that judgment should be enforced, hence a person convicted of a serious offence, particularly a repeated offender, should be denied bail;

(h) that an appellate court should not be put in awkward situation of having to return a convict upon dismissal of his appeal to prison to serve his sentence when his circumstances might have drastically changed while he is out on bail. Or he might have created a situation whereby it will be difficult to return him to prison upon dismissal of his appeal and thus frustrate justice; and

A (i) that by making bail readily available after conviction it will encourage the proliferation on unmeritorious appeals.

**[11]** In this case, the trial Magistrate had granted bail pending appeal on the solitary ground of "atas dasar kemanusiaan yang mana bapa OKT sedang sakit dan kritikal" (see p. 143 Record of Revision). This ground is obviously personal to the accused and inconsistent with the legal principles in this area of the law. In the Court of Appeal case of *KWK (A Child) v. PP* [2003] 4 CLJ 51 Augustine Paul JCA had stated in no uncertain as follows:

> To place undue weight upon matters that are personal to a person who has been convicted of an offence, even though he/she is a child, is to sacrifice the "special circumstances" that have to be proved at the altar of sympathy. In this context, the education of a child cannot be treated as having an overriding effect in an application for a stay of execution. Ultimately, there were no special circumstances to justify the grant of a stay of execution here.

**[12]** In similar vein in *Rohadi Sabtu v. PP* [2007] 10 CLJ 733, in applying for a stay of execution, the offender had advanced similar ground as the accused in this case, in that the health problems of his family. Upon referring to the case of *KWK (A Child), supra*, the court held that:

> No doubt the applicant has raised some family problems in his affidavit in support of his application and these are the financial hardship faced by the family during his absence as he was the sole bread-winner of the family and the deteriorating health of his mother. He also enclosed the latest medical report on his wife's recent illness. In my considered opinion, the family problems of the applicant as raised in his affidavit are matters provocative of sympathy but they do not constitute exceptional circumstances for the grant of a stay of his sentence. It was opined by Augustine Paul JCA (as he then was) in *KWK (A Child) v. PP (supra)* at p. 67 that 'undue weight granted to matters that are personal to the applicant would mean that the special circumstances to be proved have been sacrificed at the altar of sympathy'. Of course these circumstances can be considered in favour of the applicant if the other circumstances are also tilted towards him, which is not so in the present case, because as stated earlier there was only one factor in his favour and that was the fact that he was a first offender.

**[13]** In the instant case, learned counsel had advanced the health problem of the accused father who apparently managed to hoodwink the trial Magistrate. No medical report whatsoever was tendered by the learned counsel to backup his statement. The trial Magistrate had erred in granting bail as the offender's personal problems do not constitute special circumstances to justify the stay. Too often nowadays the court tend to readily sympathise with the accused to grant the bail, at the expense of other valid factors, once the accused or his counsel pleads personal and family hardships.

**[14]** The trial Magistrate also erred in not considering the seriousness of the offence of housebreaking with the intention to commit theft and that the accused is a habitual criminal. In *Dato' Seri Anwar Ibrahim*'s case *(supra)*, one of the grounds ought to be considered in the stay application is as follows:

> g. that public confidence in the administration of justice requires that judgment should be enforced, hence a person convicted of a serious offence, particularly a repeated offender, should be denied bail.

**[15]** In the instant case, the accused was convicted on the enhancement provision of s. 457 of the Penal Code where the maximum custodial sentence is 14 years and shall also be liable to fine and whipping. It is undoubtedly clear that the accused had been convicted of a serious offence. But unfortunately, it has been overlook by the trial Magistrate.

**[16]** In addition, the accused has three previous convictions under s. 457 and s. 411, both under the Penal Code passed by the Georgetown Magistrate Court this year ie, 2012. The accused has several other ongoing cases, also under s. 457 of the Penal Code at the Georgetown Magistrate Court. It is obvious that the accused is "a repeated offender" see *PP v. Mohd Azam Raja Abdullah* [2012] 8 CLJ 506 where maximum imprisonment term was imposed on the convicted person. Public interest demand that the accused who possessed several records of housebreaking to be in prison without giving him bail pending appeal as he is a menace and a continuous threat to society.

**[17]** Another ground need to be considered by the trial Magistrate is whether the proposed grounds of appeal is *prima facie* very strong or the rate of success in the appeal is exceptionally high. In the case of *Dato' Seri Anwar Ibrahim, supra* the court said:

> f. that where reliance is placed on proposed grounds of appeal, they must be *prima facie* very strong or extraordinary high prospect of success.

**[18]** In *Sharma Kumari*'s case, *supra*, the appeal which is not grounded on satisfactory grounds is insufficient to grant the stay of execution as there is no guarantee that the appellant will succeed in his appeal. Wahab Patail J (he then was) said:

> It also well to remember that in an application for a stay of sentence pending appeal, there is no guarantee the appeal will be successful, and the application is made in the shadow of a judgment of a court. Section 114 illustration (e) of the Evidence Act 1950 allows a court to presume that judicial acts have been regularly performed. Thus unless it is set aside by a successful appeal, that judgment remains valid and in force. In such circumstances the burden is clearly upon the applicant to show that there are good grounds why a stay ought to be granted against that court's order. It is not a burden that is lightly discharged by assertions not backed up or supported by evidence.

**[19]** In this case, at the risk of repetition, learned counsel had informed the trial court, he had yet to get instructions from the accused or his family whether to appeal or not. Learned counsel informed the court "jika arahan untuk rayuan, pohon untuk stay diberi dahulu jika rayuan difailkan" (p. 141 Record of Revision). There are no issue or issues whatsoever indicated to the court, and let alone the prospect of success by the accused.

**[20]** By allowing the application for stay of execution without considering the merits of the appeal will only open a floodgate of unmeritorious appeals upon the offender's conviction. In *Dato' Seri Anwar Ibrahim*'s case, *supra*, one of the guidelines whether to grant or otherwise of the stay application is:

> i. that by making bail readily available after conviction it will encourage the proliferation on unmeritorious appeals.

**[21]** According to the learned deputy, the conviction of the accused was based on overwhelming evidence against the accused. The accused finger impressions were found in the premises which he broke into and the stolen properties were recovered from him, said learned deputy. It is highly unlikely that the accused will be able to put up a formidable and successful appeal.

**[22]** Based on the grounds above, I set aside the stay of execution granted by the trial Magistrate and the accused is hereby ordered to serve his custodial sentence forthwith.